No. 83-1200

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., *et al.*,
Petitioners,

vs.

AMERICAN MAIL LINE, LTD., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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Showa Line, Ltd.
Transportation Maritime Mexicana, S.A.
United Philippine Lines
United States Lines, Inc.
Yamashita-Shinnihon Steamship Co., Ltd.
Zim Israel Navigation Co., Ltd.

(continued on inside front cover)

February 23, 1984

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QUESTIONS PRESENTED

1. May a shipping conference ratemaking agreement approved by the Federal Maritime Commission, and therefore exempted from the antitrust laws under section 15 of the Shipping Act, be deprived retroactively of this exemption if rates set under the agreement are later found to fall short of the broad normative rate criteria contained elsewhere in the Act?

2. Did the courts below act within the bounds of the accepted and usual course of judicial proceedings by holding that a cause of action under the antitrust laws is not established by the mere absence of antitrust immunity for contracts — where the complaint concedes (even after opportunity to amend) that these contracts were between individual defendant carriers and individual shippers of woodchips and the product of "free and open competition"?

3. Does the decision below conflict with the decision of any other circuit?[1]

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[1]In response to Rule 28.1, the following respondents and related companies have an interest in the outcome of this case: Respondent AMERICAN MAIL LINE, LTD.; respondent AMERICAN PRESIDENT LINES, LTD., American President Transportation Companies, Ltd., American President Companies, Ltd.; respondent BARBER BLUE SEA LINE A/S, Barber Lines A/S, Wilh. Wilhemsen, Blue Funnel Line, Ocean Transport & Trading, P.L.C., China Mutual Steam Navigation Co., Ltd., Swedish East Asia Line, Bronstrom Shipping Co., Ltd.; respondent THE EAST ASIATIC COMPANY, LTD. A/S; respondent GALLEON SHIPPING CORPORATION; respondent GLOBAL BULK TRANSPORT, Mercer Associates, Inc.; respondents ISTHMIAN LINES, INC. and STATES MARINE INTERNATIONAL, Isco, Inc.; respondent JAPAN LINE, LTD.; respondent KAWASAKI KISEN KAISHA, LTD.; respondent KOREA MARINE TRANSPORT CO., LTD.; respondent MARITIME COMPANY OF THE PHILIPPINES; respondent MOLLER-MAERSK

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

Petitioners brought an antitrust action against a shipping conference and its members claiming that ratemaking authorized by the Federal Maritime Commission constituted illegal price-fixing. The district court dismissed the action because this ratemaking is expressly exempted from the antitrust laws by section 15 of the Shipping Act, 1916, 46 U.S.C. § 814. The court of appeals affirmed the dismissal.

Shipping Act Regulation of Ocean Carriers

Congress created the Federal Maritime Commission ("FMC" or "Commission") to serve as the "public arbiter of competition in the shipping industry" because it "antici-

pated that various anticompetitive restraints, forbidden by the antitrust laws in other contexts, would be acceptable in the shipping industry." *FMC v. Pacific Maritime Association*, 435 U.S. 40, 53 (1978). The Shipping Act accomplishes this by empowering the Commission to approve agreements among ocean carriers to set rates collectively. "[B]efore approval or after disapproval," it is unlawful to carry out such agreements. 46 U.S.C. § 814. So long as approved, the agreement itself and actions implementing the agreement are lawful under the Shipping Act and exempt from the antitrust laws. This immunity continues until expressly withdrawn by the FMC. *Id.*

The Shipping Act Proceedings Involving These Parties

Petitioners' antitrust claims are predicated on earlier proceedings under the Shipping Act.

In 1972, petitioner National Association of Recycling Industries, Inc. ("NARI"), requested that the Commission institute an investigation of the wastepaper rates of respondent Pacific Westbound Conference ("PWC" or "Conference"). NARI asserted that PWC[2] had set rates to the Far East that were unreasonably high and discriminatory. Although wastepaper rates were among the lowest in PWC's tariffs,[3] NARI contended that lower shipping rates for a

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[2]The respondents are PWC and certain of its present and former members, which we shall refer to collectively as "PWC". The petitioners are NARI and certain of its members, which we shall refer to collectively as "NARI".

[3]NARI's repeated characterization of PWC as a "monopoly" has no relevance to either application of the Court's standards governing review or analysis of the underlying antitrust questions. Nonetheless, we note that NARI has not been charged monopoly prices. The FMC in its investigation of the NARI/PWC dispute found that

different commodity, woodpulp, demonstrated that PWC's wastepaper rates were unlawfully high—in essence a discriminatory rate theory.[4]

In 1977, the Commission's administrative law judge ("ALJ") issued a recommended decision stating that PWC's wastepaper rates were unreasonably high under section 18(b)(5) of the Shipping Act and that therefore "PWC operated beyond the scope" of its section 15 immunity.[5] After independent review of the record, the Commission rejected the ALJ's recommendations in their entirety and upheld the wastepaper rates as lawful. The Commission found that wastepaper shippers had not been harmed by PWC's rates and that there was no evidence that PWC's rate structure had inhibited the export of wastepaper. *Pacific Westbound Conference—Investigation of Rates*, 21 F.M.C. at 840-42. The Commission specifically rejected the ALJ's construction of section 15 and ruled that conference ratemaking could not retroactively lose its immunity *even if* the rates were unreasonably high. *Id.* at 841 n.31.

On petition for review, the Commission's order was vacated. *National Association of Recycling Industries, Inc. v. FMC*, 658 F.2d 816, 829 (D.C. Cir. 1980) ("*NARI v.*

PWC's wastepaper rates were, as of 1979, "well below the average freight rate of the 113 highest tonnage/volume commodities moving to the Far East." Pacific Westbound Conference—Investigation of Rates, 21 F.M.C. 834, 835 n. 9 (1979).

[4]The rates of which NARI originally complained were in effect prior to 1975. Today, wastepaper rates are lower than woodpulp rates in most Far East trades. *See* CR 38 at 14.

[5]Pacific Westbound Conference—Wastepaper & Woodpulp from United States West Coast to Far East, 17 S.R.R. 929, 1000, 1002 (Initial Decision 1977).

FMC"). The court, one judge dissenting, disapproved the FMC's handling of the voluminous record. *Id.* at 825, 829. Further, it found that the FMC had incorrectly interpreted the legal standard of section 18(b)(5) by treating "unreasonableness" and "detriment to commerce" as independent instead of dependent criteria. *Id.* at 827. However, the court left undisturbed the Commission's conclusion that PWC had not operated outside the scope of its antitrust immunity. *Id.* at 826-27.

Before the D.C. Circuit, NARI argued that the ALJ had found PWC's ratemaking activities "violative of Section 15 of the Shipping Act—and beyond the limits of any antitrust immunity under that section of the Act". Brief for Petitioners at 52, *NARI v. FMC*. The Antitrust Division of the Department of Justice, while supporting NARI's contention that the Commission had misconstrued the standard of section 18(b)(5), nonetheless argued that the Commission's rejection of antitrust liability was correct on the facts of this case.[6]

The D.C. Circuit ruled that under the "analytically simpler approach" of section 18(b)(5) only the reasonableness of the wastepaper rates and their effect on U.S. foreign commerce were in issue and that it "need not rely on section 15" in reviewing the Commission's decision.

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[6]The Department's evaluation was that the case involved only ordinary ratemaking and, therefore, the Conference's antitrust immunity was not at stake:

> The language of section 15 does not oust the antitrust laws entirely from their application to regulated shipping matters, but it likewise did not intend to require that conference members tread quite so warily in the routine implementation of approved conference authority. [Brief for the United States at 36-37 n.29 (citations omitted), *NARI v. FMC*.]

658 F.2d at 826. To rule otherwise would present "a danger that § 18(b)(5) could swallow up a sizeable chunk of the antitrust freedom originating in § 15." *Id.* at 826-27 n.59. Thus, the D.C. Circuit held only that PWC's wastepaper rates could not be approved on the basis of the existing administrative record and left the Commission to decide if further proceedings would be necessary. *Id.* at 829.[7]

Instead of requesting further relief from the FMC,[8] petitioners brought this action.

The Antitrust Proceedings Below

In this action, NARI claims in essence that every time during the last seventeen years that PWC set a wastepaper rate, it violated the antitrust laws. App. at 42a-46a. NARI requests both treble damages and injunctive relief. *Id.* at 49a-51a.

In response to the complaint, PWC moved for dismissal on the ground that, because the challenged ratemaking was

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[7]Contrary to NARI's representations, the D.C. Circuit did not reinstate the ALJ's recommended findings, nor did it hold that PWC's wastepaper rates violated section 18(b)(5). The court's judgment was narrow and specific:

> ORDERED and ADJUDGED by this Court, that the order of the Commission on review herein is vacated and the case is remanded. The Commission may engage in any further administrative proceedings in this case not inconsistent with the opinion of this Court filed herein this date. [CR 36 at 35.]

[8]After the decision in *NARI v. FMC*, the Commission asked the parties if further Commission action were necessary. CR 24 at 108. In response, NARI urged the FMC not to proceed further. *Id.* at 111. Having taken that position, NARI may not now claim that "the Commission has arbitrarily and capriciously stalled and foreclosed all avenues of relief under the Shipping Act in this case, and it continues to do so today." Pet. at 29.

conducted under an express exemption from the antitrust laws, the complaint fails to state a claim for which relief may be granted. CR 24. The Antitrust Division of the Department of Justice, in an *amicus* brief filed on behalf of the FMC, supported PWC's argument for dismissal. CR 34. In granting PWC's motion, the district court held:

> Approved agreements and activities, including the setting of rates authorized by such agreements are immunized from the antitrust laws regardless of whether those rates are later found to be violative of substantive provisions of the Shipping Act. [App. at 21a.]

The district court did not, however, foreclose the possibility that NARI's additional and vague allegations concerning contracts to transport woodchips entered into individually by certain of the defendant carriers might, if amended, state a claim. Accordingly, the court granted NARI thirty days in which to file an amended complaint attempting to explain how these contracts violate the antitrust laws. *Id.* NARI filed no such amendment, and the district court ultimately entered a judgment dismissing the entire action with prejudice. CR 60.

On appeal,[9] the court unanimously rejected NARI's construction of section 15 and affirmed the district court

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[9]The Antitrust Division of the Department of Justice again filed an *amicus* brief in behalf of the FMC and in opposition to NARI. It stated:

> [NARI's] theory is contrary to the structure of the Shipping Act, and its effect would be to render the antitrust exemption authorized by section 15 nearly meaningless. NARI's theory is also inconsistent with judicially recognized standards for determining whether conference action is within the scope of an

in all respects. In regard to NARI's fundamental theory, the court ruled:

> Plaintiffs in this case . . . seek to impose retroactive antitrust liability for allegedly unreasonably high rates which have been set pursuant to an approved agreement and which have not yet been disapproved by the FMC. That result in our view would be fundamentally contrary to the Congressional intent behind the Shipping Act's regulatory scheme. The possibility of such potential retroactive liability for rates later declared unlawful would place carriers in a position of great uncertainty and would force them to seek formal FMC approval in connection with every rate change. Yet the language of section 15 clearly indicates that Congress intended to give carriers the latitude to enact new rates, without separate approval, to meet quickly changing market conditions. [App. at 4a (citation omitted).]

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approved agreement or constitutes a separate, unapproved agreement. Since NARI's complaint fails to allege that the wastepaper rates on which it bases its complaint were the product of or the means of implementing an unapproved agreement within the accepted meaning of that phrase, the district court properly dismissed the complaint for failure to state a cause of action. [Brief of Amicus Curiae Federal Maritime Commission at 10.]

REASONS FOR DENYING THE WRIT

The decision below does not conflict with any decision of the Court or any circuit and correctly applies the statute. Moreover, NARI has pled no agreement between competitors which has not been approved by the FMC, even though NARI had ample opportunity to do so. Therefore, the complaint was properly dismissed.

I. The Decision Below Is Fully in Accord with the Court's Decision in Carnation and Is Correctly Decided.

NARI's principal contention is that the decision below is in conflict with the Court's decision in *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966). NARI's argument is that the setting of rates—the most routine of actions by a shipping conference—may retroactively lose its antitrust immunity by some after-the-fact finding that the rates are unreasonable. Pet. at 13-17. Rather than support NARI's argument, however, *Carnation* repudiates it.

Carnation held that the implementation of ratemaking agreements not approved by the Commission is subject to the antitrust laws. 383 U.S. at 216. Plaintiffs there alleged inter-conference ratemaking under agreements that had neither been filed with the Commission nor approved by it. *Id.* at 215. The district court had dismissed the action on the ground that all ratemaking activities of the shipping industry had been exempted from the antitrust laws by the Shipping Act—in essence a ruling that the agency had exclusive jurisdiction over such matters.[10] The Court held

[10] *See* United States Navigation Co. v. Cunard Steamship Co., 284 U.S. 474 (1932).

the complaint actionable because section 15 of the Shipping Act contains an express antitrust exemption. The Court reasoned that the Act should not be construed as also creating an implied immunity applicable where the express exemption is not.

> The Shipping Act contains an explicit provision exempting activities which are lawful under § 15 of the Act from the Sherman and Clayton Acts. This express provision *covers approved agreements*, which are lawful under § 15, *but does not apply to the implementation of unapproved agreements*, which is specifically prohibited by § 15. [*Id.* at 216 (footnote omitted; emphasis supplied).]

In other words, ratemaking which implements an approved ratemaking agreement enjoys an express antitrust immunity, and ratemaking under an unapproved agreement does not. *Accord Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 271 (1968) (every agreement "filed with and approved by the Commission is immunized from challenge under the antitrust laws"); *Yellow Forwarding Co. v. Atlantic Container Line*, 668 F.2d 350, 352 (8th Cir. 1981) ("Agreements approved by the Commission and activities conducted pursuant to approved agreements are exempt from the antitrust laws"), *cert. denied*, 456 U.S. 962 (1982).[11]

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[11] NARI further argues that the decision below conflicts with *Carnation*, contending that the "decision implies that petitioners cannot seek relief under the antitrust laws in this case because" remedies exist under the Shipping Act. Pet. at 28. NARI mischaracterizes the decision below. The court did not rule that NARI had no antitrust remedy *because* Shipping Act remedies are available; it merely noted the weakness of NARI's "no remedy" claim. App. at 7a.

The conduct NARI challenges is routine ratemaking "contemplated by the plain language" of the PWC Agreement. *Pacific Westbound Conference v. FMC*, 440 F.2d 1303, 1309 (5th Cir.), *cert. denied*, 404 U.S. 881 (1971).[12] Section 15 allows tariff rates to take effect without prior approval, in recognition that such rates are the implementation of an approved agreement which does not require separate approval.[13]

The application of section 15 and *Carnation* to the facts alleged in the complaint is straightforward. Section 15 grants antitrust immunity to "[e]very agreement . . . lawful under this section," and it further provides that "agreements . . . shall be lawful only when and so long as

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[12]Contrary to NARI's contention, the decision below is entirely consistent with the Fifth Circuit's decision in Pacific Westbound Conference v. FMC. That case concerned construction of the agreements which had been in part the basis for the plaintiff's allegations in *Carnation*. The court held that an inter-conference agreement approved by the FMC authorized joint ratemaking but that certain "supplementary" agreements required separate FMC approval. *Id.* at 1312.

[13]Section 15 provides in pertinent part that:

> [T]ariff rates, fares, and charges, . . . agreed upon by approved conferences . . . if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title [section 18(b) of the Shipping Act] and with the provisions of any regulations the Commission may adopt.

The function of this provision is "to leave conferences free to adopt rates and to amend them from time to time *without the need for formal Board approval* of each such rate action as a separate section 15 agreement." Hearings on H.R. 4299 Before Special Subcomm. on Steamship Conferences of the Comm. on Merchant Marine and Fisheries, 87th Cong., 1st Sess. 461 (1961) (statement of Thomas E. Stakem, Chairman, Federal Maritime Board) (emphasis supplied).

approved by the Commission." Conversely, *Carnation* holds that agreements not filed and approved have no antitrust exemption. The PWC Agreement has been filed, approved, and not subsequently disapproved. It confers ratemaking authority. PWC's wastepaper rates were filed and published by the Conference in accordance with section 18(b) and applicable regulations. Thus, the PWC Agreement and the rates implementing it are lawful under section 15 and are therefore exempted from the antitrust laws.

The PWC Agreement contains an article which tracks the Shipping Act's anti-discrimination provisions.[14] Based on this, NARI argues that, because PWC's rates were supposedly discriminatory, they must be outside the scope of PWC's approved authority. Pet. at 14. This argument attempts to undermine the statutory immunity in the same manner as NARI's fundamental theory. As the court below ruled:

> [i]t would be anomalous to hold that defendants are exempt from application of the antitrust laws even if violation of the Shipping Act could be established, and then to hold that defendants were so liable for writing into their agreement provisions of the Shipping Act that they were bound by anyway. [App. at 7a, *quoting* the district court, App. at 20a-21a.]

The court below properly rejected NARI's arguments.[15]

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[14]This is a provision commonly contained in shipping conference agreements filed with and approved by the FMC. *See, e.g.*, Article 2 of FMC Agreement No. 17, Article 14 of FMC Agreement No. 150, Article 14 of FMC Agreement No. 3103, Article 8 of FMC Agreement No. 5680, and Article 7 of FMC Agreement No. 6060.

[15]A contrary interpretation of section 15 would wreak havoc with the statutory scheme. Conferences are primarily ratemaking organs. *NARI v. FMC*, 658 F.2d at 826 n.59. In our foreign trades, these rates constantly change in response to new competitive conditions.

(continued on next page)

II. In Affirming Dismissal of NARI's Woodchip Claim for Failure to State a Cause of Action, the Decision Below Is Consistent with the Decisions Cited by NARI and Judicial Standards.

NARI argues that the decision below erred in affirming the dismissal of its claim that certain contracts for the transportation of woodchips somehow violate the antitrust laws. In support of this argument, NARI cites a large number of cases stating maxims such as that an antitrust exemption will be "narrowly construed," an exemption may be lost when exempt parties act in concert with non-exempt parties, the antitrust laws apply to maritime contracts which the FMC has not approved, and courts should look to the "economic reality" of a transaction. Pet. at 17-21. None of these maxims is contradicted or offended by the dismissal below of NARI's woodchip claim.

The complaint contains no allegations that the woodchip contracts were the product of an unlawful conspiracy. Rather, the complaint twice says that certain defendant carriers "entered into individual long-term (10 years or more) contracts with competing shippers." App. at 36a, 45a. These agreements, NARI also says in its complaint, were "arrived at through free and open competition among defendant carriers." App. at 36a; see also *id.* at 35a.

The woodchip contracts were entered into by individual defendant carriers with individual shippers and are not

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Interpool, Ltd. v. FMC, 663 F.2d 142, 147-48 (D.C. Cir. 1980). The protection from the antitrust laws would be flimsy indeed if it could be lost retroactively every time a rate is subsequently examined under the "broad normative criteria", FMC v. Caragher, 364 F.2d 709, 713 (2d Cir. 1966), contained in the Act's substantive rate regulation provisions.

subject to PWC or FMC regulation.[16] No defendant has claimed that these contracts have antitrust immunity. However, the absence of antitrust immunity for the woodchip contracts does not mean that there is a cause of action under the antitrust laws.

NARI had ample opportunity to explain why it thinks there could be an antitrust violation in the woodchip contracts. The district court offered NARI thirty days to amend the complaint "setting forth more fully their theory of relief" regarding woodchips. App. at 21a. NARI refused, and the district court ultimately dismissed with prejudice. CR 60. The court of appeals specifically affirmed on this point because the woodchip contracts "are not alleged in any way to have been consummated in violation of the antitrust laws." App. at 8a.[17]

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[16]These woodchips are transported by certain defendant carriers who are members of the PWC, but the transportation by each is as an independent carrier. This independence is both from the PWC and from other carriers; the woodchip carriers do not agree with each other on any subject. The transportation circumstances for woodchips are radically different from those pertaining to Conference movements. Woodchips move in bulk under long-term contracts in the open holds of specially designed vessels dedicated to woodchip service. App. at 58a. Wastepaper moves in common carriage in specially designed vessels, each capable of accommodating several hundred containers transporting all variety of containerized cargo. *Id.* at 59a. Because the transportation economics are different, the rates are different. Because the woodchips move in bulk, their rates are not subject to the FMC's tariff filing requirements. 46 U.S.C. § 817(b)(1). The woodchip vessels are not common carriers and therefore, are not subject to FMC regulation. *Id.* at § 801.

[17]Neither did the courts below fail to view NARI's claims as a whole, as NARI argues at 20 *citing* Swift & Co. v. United States, 196 U.S. 375 (1905) and Continental Ore v. Union Carbide & Carbon Co., 370 U.S. 690 (1962). Rather, the district court based no

III. The Decision Below Does Not Conflict with Any Decision of Any Other Circuit.

NARI's claims that the decision below conflicts with other decisions merit only brief mention here.

First, the Ninth Circuit did not "acknowledge the inconsistency of its decision" with *United States v. Bessemer & Lake Erie Railroad*, 717 F.2d 593 (D.C. Cir. 1983), as NARI claims. Pet. at 23. Rather, the decision below *distinguished Bessemer* on various grounds, including the fact that it involved agreements *between* competitors "wholly outside the scope of ICC-sanctioned rate-making." App. at 5a-6a.[15]

Second, while there is a conflict between the decision below and *Sabre Shipping Corp. v. American President Lines, Ltd.*, 285 F.Supp. 949 (S.D.N.Y. 1968) (interlocutory order), *cert. denied sub nom. Japan Line, Ltd. v. Sabre Shipping Corp.*, 407 F.2d 173 (2d Cir.), *cert. denied*, 395 U.S. 922 (1969), *Sabre* is not a decision on the merits of this issue by either a court of appeals or this Court. The

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determination of any issue on any restricted segment of NARI's evidence. In fact, the court granted NARI the opportunity to set forth more fully its theory of relief by pleading additional facts or by explaining further how the alleged non-immune conduct might violate the antitrust laws. App. at 21a. The mere fact that the court discussed separately the immunity of PWC wastepaper rates and the non-immune, individual woodchip contracts is not a prohibited compartmentalization.

[15]Georgia v. Pennsylvania R., 324 U.S. 439 (1945), on which NARI also relies, has little relevance to its claims. There the Court rejected an argument that the Interstate Commerce Act conferred implied antitrust immunity for rate-fixing by railroad rate bureaus. *Id.* at 456-57. Congress responded by enacting a limited and express antitrust exemption for such rate bureau agreements. *See* United States v. Bessemer & Lake Erie R.R., 717 F.2d at 595-96.

district court decision in *Sabre* has never been cited favorably by any other court for the proposition that NARI asserts. The Antitrust Division of the Department of Justice has repeatedly rejected *Sabre's* construction of section 15.[19] As the court of appeals and district court decisions below explain, *Sabre* was incorrectly decided because it confused agreements which authorize ratemaking with the rates themselves. App. at 5a & n.1, 14a-17a.[20]

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[19]Brief for the United States at 36-37 n.29, *NARI v. FMC*; Supplemental Reply Brief for the United States at 6-7 n.7, United States v. FMC, 694 F.2d 793 (D.C. Cir. 1982); Brief for Amicus Curiae Federal Maritime Commission (filed by the Antitrust Division in the Ninth Circuit below) at 20-21; *see also* note 9, *supra*.

[20]The decision below does not conflict with In re Ocean Shipping Antitrust Litigation, 500 F. Supp. 1235 (S.D.N.Y. 1980), because that case involved agreements between competing carriers which had not been approved by the FMC. Here, NARI has pled no such agreements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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